Petition

81-343

NO.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

NICHOLAS CIVELLA, PETER TAMBURELLO, and JOHN TORTORA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in declining to reach the merits of the challenge raised below to the Court-authorized wire intercepts on the bases of lack of standing and non-retroactive application of *United States v. Anderson,* 626 F.2d 1358 (8th Cir., 1980)?

2. Can massive pre-indictment prejudicial publicity require dismissal of an indictment without the showing of actual prejudice under circumstances as herein occurred?

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IN THE

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NICHOLAS CIVELLA, PETER TAMBURELLO, and JOHN TORTORA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NICHOLAS CIVELLA, PETER TAMBURELLO, and JOHN TORTORA, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

On May 13, 1981, the Court of Appeals entered its panel opinion affirming the convictions of the Petitioners (hereafter, Defendants) for violations of Conspiring to Bribe a

Public Official and Use of a Communication Facility in Interstate Commerce in carrying out this Conspiracy, in violation of 18 U.S.C. § § 2201(b)(1), 371, § 2, § 1952, and § 2. The Opinion of the Court of Appeals is set out in full as Appendix "A" hereof.

On June 10, 1981, the Court of Appeals entered its Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc. A copy of this Order is reproduced as Appendix "B" hereof.

Defendant CIVELLA is presently incarcerated at the Federal Correctional Institute, El Reno, Oklahoma, as a result of this conviction; Defendant TORTORA is presently incarcerated at the Medical Center for Federal Prisoners at Springfield, Missouri serving the sentence imposed upon him in this matter; Defendant TAMBURELLO is presently incarcerated at the Federal Correctional Institute, Sandstone, Minnesota, serving the sentence imposed upon him in this matter.

JURISDICTION

Jurisdiction was initiated by criminal indictment of a federal grand jury, and jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of 18 U.S.C. § 2510 are:

> (11) Aggrieved person means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

The pertinent provisions of 18 U.S.C. §1961 are:

(4) Enterprise includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

The pertinent provisions of 18 U.S.C. §1962 are:

(b) It shall be unlawful for any person, through a pattern of racketeering activity, or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which effect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which effect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.

STATEMENT OF THE CASE

The three Petitioners-Defendants herein were charged in a two-count indictment with a Conspiracy to Violate §201(b)(1) of Title 18 U.S.C., by knowingly and corruptly agreeing to offer to a public official, a thing of value to influence an official act, all in violation of Title 18 U.S.C. §371 and §2, and a substantive violation of Title 18 U.S.C. §1952, and §2, in that these same individuals did use and cause the use of a communication facility in interstate commerce with the intent to promote, manage and carryon and facilitate the promotion, management and carrying on of an unlawful activity, said unlawful activity being Bribery in

violation of Title 18 U.S.C. §201. Petitioners CIVELLA and TORTORA were sentenced to four (4) years custody of the Attorney General and Petitioner TAMBURELLO was sentenced to two (2) years custody of the Attorney General.

The evidence resulting in the return of this indictment and the subsequent convictions was derived from the interception of wire and oral communications which began on May 5, 1978 and ran through February of 1979. The evidence used against these three individuals consisted primarily of nine (9) tape-recorded conversations which were intercepted pursuant to Court Orders dated September 24 and November 10 of 1978. While the Court Orders of September 24th and November 10th of 1978 led directly to the interception of the conversations relevant to these convictions, these Court Orders were predicated upon prior interceptions dating back to the initial interception applied for on May 5, 1978. The May 5, 1978 and May 25, 1978 authorizations for interception of communiations were based upon applications asserting that there was probable cause to believe that an "enterprise" existed which was involved in a pattern of "racketeering activity" in violation of 18 U.S.C. §1962(c)(d). The enterprise alluded to in the May 5, 1978 and May 25, 1978 applications was referenced as the "Civella" organization, which was allegedly involved in racketeering activities in the Western District of Missouri. Petitioners CIVELLA and TAMBURELLO were mentioned prominently in the affidavits in support of the first two applications, those of May 5, 1978 and May 25, 1978. Petitioner CIVELLA was not a target of the interceptions in these first two applications, and the same is true of Petitioners TAMBURELLO and TORTORA.

Prior to trial, during trial, and following trial in this matter, the Petitioners herein moved to suppress the tape recordings

which were subsequently used at the trial in this case, on the ground that these intercepted conversations were illegally obtained by the Government. The basis for this argument was that the initial Court Orders of May 5, 1978 and May 25, 1978 were unlawful in that probable cause for such interceptions was lacking. In support of this argument, the Petitioners cited to the Court Below, the decision in *United States v. Anderson,* 626 F.2d 1358 (8th Cir., 1980), *Cert. denied,* ____ U.S. ____, 101 S.Ct. 1351 (1981). In *Anderson supra,* the Circuit Court addressed the issue of what constitutes an "enterprise" for the purpose of 18 U.S.C. §1962. It was further asserted that if the May 5, 1978 and May 25, 1978 orders were lacking in probable cause, then all of the subsequent orders, which were admittedly based upon information obtained pursuant to the initial orders, would also be illegal.

The Court on Appeal declined to reach the merit of the challenge to the lack of probable cause in the May 5, 1978 and May 25, 1978 orders authorizing electronic surveillance on the basis that the Petitioners herein had no "standing" to challenge these two early Court Orders, and on the second basis that the Court of Appeals declined to apply the decision in the *Anderson, supra* case retroactively.

In addition, the Petitioners herein prior to trial moved to dismiss the indictment on the basis that the grand jury was biased by massive prejudicial publicity which spanned a considerable amount of time prior to the return of the indictment in this matter. The Petitioners further requested dismissal on the basis that much of this prejudicial pre-indictment publicity was generated by the Government in order to effect the proceedings in this case. The Court Below dismissed these motions holding that no showing of actual prejudice was made by the Petitioners to warrant the requested action.

For the purpose of this Petition, the facts of the case are not in dispute, and are not relevant. It is solely the motions to suppress the tape recorded conversations and the motions to dismiss based upon the prejudicial pre-indictment publicity which form the bases for this Petition.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN REFUSING TO REACH THE MERITS OF THE CHALLENGE TO THE INITIATING COURT AUTHORIZED INTERCEPTIONS ON THE BASIS OF LACK OF STANDING AND ON THE BASIS OF ITS INTERPRETATION OF THE PHRASE "ENTERPRISE".

The Government in applying to the Courts for authorization to intercept wire and oral communications in May of 1978 based its presentation of probable cause upon a showing that an "organization" existed which was involved in racketeering activities. The Government painted the picture of this organization as being headed by Petitioner CIVELLA. Throughout its presentation of probable cause, this organization was portrayed by the Government as the "Civella Organization". The name of the Petitioner CIVELLA was prominent throughout the body of these applications. While the conversations of Mr. CIVELLA were not *per se* targeted, the Petitioner CIVELLA was named by the Government as the head of the "organization" which was the entity against whom the interceptions were directed.

The Government never refuted that the evidence derived from the early interception orders of May of 1978 led directly or indirectly to the probable cause proffered to the Court in later applications for electronic surveillances which led directly to the conversations utilized in this prosecution. Without the intercepted conversations from the early surveillances, and evidence derived from these conversations, there would have been no probable cause to authorize the later interceptions which were directly relevant to the Petition and to this case.

The Court of Appeals held that a defendant may challenge evidence gathered pursuant to an interception order only if that order is directed at *him,* that the Government intercept *his* conversations or that the wiretapped communications occurred at least partly on *his* premises. The Court of Appeals further held that none of the three Petitioners herein were named as "targets" of these early interception orders, and none of their conversations were recorded under the authority of these specific orders. What the Court of Appeals failed to address, however, was that Title 18 U.S.C. §2510(11) defines "aggrieved person" as a person "against whom the interception was directed". While the interception orders may be read to mean that they were not directed against Petitioner CIVELLA pesonally, it can be no doubt that they were directed against an organization which was termed as Mr. CIVELLA'S organization, an organization which was painted as being headed by Mr. CIVELLA, and as an enterprise from which Mr. CIVELLA could not be separated. A reading of the decision of *Alderman v. United States,* 394 U.S. 165 (1969) cannot exclude Mr. CIVELLA from being an aggrieved person under the circumstances herein presented, and as such, cannot deny Mr. CIVELLA the standing to raise the illegality of these early inter-

ceptions. Petitioner CIVELLA was specifically named in the affidavit in support of the May 25th interception as was Petitioner TAMBURELLO, as part of the "enterprise" or "organization" against which the interception was directed. Both of these Petitioners were named as part of the "organization" which was the target of the interceptions. While they were not specifically named as individuals whose conversations would be intercepted, they were named as head of and part of the organization against which the intercepts were directed. The phrase "person" in 18 U.S.C. §2510(11) cannot be read to mean an individual only, but certainly in conjunction with 18 U.S.C. §1962, must be read as a person and/or an organization and/or an enterprise. Since the only fair reading of these early intercept orders was that they were directed against this "organization" or "enterprise", the aggrieved person concept of *Alderman, supra* must be applied against the total "organization", and not just as against an individual.

The Court of Appeals in its Decision further held that even assuming that the Defendants had "standing" to assert the violations of these interceptions, they would still not reach the merits of the claim on the basis that the early applications did contain probable cause at the time they were issued. The Appellate Court Below refused to apply the holding of their decision in *Anderson, supra* retroactively to apply to the phrase "enterprise" as contained within the early applications for interceptions.

This Honorable Court, has recently decided the case of *United States v. Turkette*, ____ U.S. ____, 69 L.Ed.2d 246, 101 S.Ct. ____ (1981). In that Decision, this Court held that a wholly criminal enterprise comes within the ambit of the "RICO" Statute. However, this Court also held that "a pattern of racketeering activity" does not necessarily prove

an "enterprise". The Government is obligated to prove both the existence of the "enterprise" and the connected "pattern of racketeering activity". This Court held that proof of one of these two terms does not necessarily establish the other. "The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government."

The argument raised to the Court of Appeals concerning the lack of probable cause in these early intercepts was, in part, that the "enterprise" referred to in these affidavits in support of the early orders for interception was in fact nothing more than the pattern of racketeering activity alluded to in these affidavits. The Court of Appeals refused to apply its holding in *Anderson, supra* retroactively, and did not reach the argument proffered on this issue. In light of the Court's holding in *Turkette, supra,* it is submitted that the Court of Appeals erred in not addressing this issue directly. The Court of Appeals in its decision specifically stated that it had in its *Anderson* Opinion addressed this issue of what constitutes an "enterprise" for the purpose of the RICO Statute, and stated that the *Anderson* Decision raised "serious questions about whether the affidavits and the applications of the Government in this case provided probable cause to support its theory that an "enterprise", in fact, existed." By refusing to discuss this question directly, and choosing to rely on the non-retroactive application of its own decision, the Court has ignored the pertinent issue. The language quoted above from this Court's Opinion in *Turkette, supra,* indicates plainly that this issue should have been addressed, and it is submitted that it was error for the Court of Appeals not to have considered and addressed this issue.

II.

THE MASSIVE PRE-INDICTMENT PREJUDICIAL PUBLICITY WHICH OCCURRED IN THIS MATTER, A SUBSTANTIAL AMOUNT OF WHICH WAS ENGENDERED BY THE FEDERAL GOVERNMENT, REQUIRED DISMISSAL OF THE UNDERLYING INDICTMENT.

Prior to the trial in this matter, the Defendants moved to dismiss the indictment on the basis that the indicting grand jury was biased by reason of massive, prejudicial publicity against the Defendants, particularly against Defendant CIVELLA. The Defendants also filed a motion for dismissal of the indictment on the ground that the Department of Justice and other Government officials had themselves generated a massive amount of prejudicial publicity against these Defendants.

A lengthy pre-trial evidentiary hearing was conducted on this matter and the Trial Court denied these motions on the grounds that the Defendants had failed to show that the publicity had, in fact, prejudiced the grand jurors.

For this Court's edification, as part of the record below, it was indicated that approximately 275 separate newspaper stories were carried in one Kansas City newspaper which specifically named Defendant CIVELLA. One five-part newspaper series published in this newspaper between February and March of 1979 focused upon Defendant CIVELLA, and drew largely from an interview with the attorney in charge of the United States Department of Justice Strike Force located in Kansas City. Additional governmental engendered publicity was shown to have occurred following press releases prepared by a supervisory agent of the F.B.I. in Kansas City, Missouri.

The Court of Appeals in deciding this issue held that the Petitioners had failed to carry their burden of proving that the grand jury was, in fact, prejudiced.

This Honorable Court has expressed in several opinions the right of a criminal defendant to be investigated by a grand jury whose members have not been prejudiced and tainted by pre-indictment publicity. *Beck v. Washington,* 369 U.S. 541, 546 (1962); *Lawn v. United States,* 350 U.S. 359, 363 (1956).

In *Costello v. United States,* 350 U.S. 359 (1956), the Court held:

> "An indictment returned by a legally constituted and *unbiased* grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." (*Supra,* at page 363, emphasis added.)

If the Fifth Amendment requires nothing more than the indictment by an *unbiased* grand jury, the Fifth Amendment is not satisfied by anything less.

This was also the holding of *United States v. Gold,* 470 F.Supp. 1336, 1345-46 (U.S.D.C. Ill., 1979).

The Case of *United States v. Sweig,* 316 F.Supp. 1148 (S.D.N.Y., 1970), aff'd. 441 F.2d 114 (2nd Circ. *Cert. denied* 403 U.S. 932, 1971) held that in a situation where pre-indictment publicity, by itself, might not be sufficient to fatally taint a grand jury investigation and indictment, the opposite result would be reached if the Government itself had generated the publicity. That case made clear that prosecution generated publicity is a circumstance which cannot be ignored under the common rubric that until actual prejudice is shown, there can be no relief from the effect of pre-indictment publicity.

Other Courts have also intimated that prosecution engendered publicity might, in itself, be enough to require indictment dismissal. *Silverthorn v. United States,* 400 F.2d 627, 633-34 (9th Cir., 1968); *United States v. Nunan,* 236 F.2d 536, 593 (2nd Cir., 1956); and *United States v. Kahaner,* 204 F.Supp. 921-22 (S.D.N.Y., 1962).

Under the situation as it existed in this matter, it is submitted that the Court Below erred in ruling that actual prejudice need be shown, and was not shown by the Petitioners herein.

CONCLUSION

Based on the above two questions presented, it is respectfully stated that review of this case is necessary to remedy the errors committed by the Court Below.

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CERTIFICATE OF SERVICE

It is hereby certified that three true and correct copies of the foregoing Petition for Writ of Certiorari were delivered that _____ day of August, 1981, to the United States Solicitor General, United States Department of Justice, Washington, D.C. 20530.

_____

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1828	*	
United States of America, Appellee,	*	
v.	*	
Nicholas Civella, Appellant.	*	
No. 80-1829	*	
United States of America, Appellee,	*	Appeals from the United States District Court for the Western District of Missouri
v.	*	
Peter Tamburello, Appellant.	*	

No. 80-1844

United States of America,

Appellee,

v.

John Tortora,

Appellant.

Submitted: February 13, 1981
Filed: May 13, 1981

Before ROSS, HENLEY and McMILLIAN, Circuit Judges.

ROSS, Circuit Judge.

On July 18, 1980, appellants Civella, Tamburello and Tortora were convicted by a jury on a two count indictment charging them with conspiring to bribe a public official[1] and using the communication facilities in interstate commerce in carrying out their conspiracy.[2] The evidence against these men consisted primarily of nine taped recordings of their conversations, which were intercepted by federal agents pursuant to court orders dated September 24 and November 10, 1978. The defendants moved, before, during and after the trial, to suppress these recordings. The defendants also filed pretrial motions to dismiss the indictment, alleging that the grand jury was prejudiced by preindictment publicity.

[1] 18 U.S.C. § § 201(b)(1), 371 and 2.

[2] 18 U.S.C. § § 1952 and 2.

These motions and a subsequent motion for a new trial or for a judgment of acquittal were denied by the district court.[3] This timely appeal follows.

The tape recordings which were introduced into evidence at trial were obtained in the course of an ongoing investigation by federal agents which followed a series of alleged "gangland style" murders in Kansas City. On May 5, 1978, based on information that another murder was about to be committed, federal agents sought and received authority to install electronic surveillance devices on four automobiles. The application for the court order asserted that there was probable cause to believe that an "enterprise" existed which was involved in a pattern of "racketeering activity" in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1962(c) and (d). The application further alleged that the offenses underlying the RICO violation were violations of various Missouri statutes relating to murder, attempted murder, conspiracy to commit murder and extortion, and several federal statutes relating to conspiracy, obstruction of justice and investigations, and interference with commerce by threats and violence.[4] No evidence was obtained pursuant to this first order.

On May 25, 1978, an extension of the May 5 order was granted which covered the same four automobiles, two tables in a restaurant in Kansas City and several additional individuals. The application contained repetitions of the probable cause cited in the May 5 application but added information relating to a murder committed on May 16, 1978, and allegations that the "enterprise" was engaged in extortionate credit practices and gambling offenses.[5] No

[3]The United States District Court for the Western District of Missouri, the Honorable Scott O. Wright, District Judge, presiding.

[4]18 U.S.C. §§371, 1503, 1510 and 1951.

[5]18 U.S.C. §§892, 893, 894 and 1955.

conversations of the three appellants were overheard pursuant to this second order.

Several subsequent applications were approved by the district courts which broadened the scope of the investigation.[6] Although Nicholas Civella and Peter Tamburello were mentioned in the affidavits in support of the first two applications, Civella was first identified as a target of the interceptions in the third court order, dated July 29, 1979. Tamburello was first named as a target of the interceptions in the fifth order, dated August 30, 1978. John Tortora was never named as a target of the investigation in any of the court orders. The tape recordings which provided the evidence for their convictions for conspiring to bribe a public official were gathered pursuant to later orders, issued on September 24 and November 10, 1978.

The defendants were indicted on February 13, 1980. On May 5, 1980, several pretrial motions were filed, including motions for dismissal of the indictment due to massive prejudicial publicity and to suppress the tape recordings. A separate motion for dismissal of the indictment due to massive prejudicial publicity was filed, alleging that the United States Department of Justice and other government officials had generated prejudicial publicity against the defendants. An evidentiary hearing was held on these and other motions and these motions were subsequently denied in the trial court's memorandum and order of July 14, 1980.

On appeal the defendants again argue that the tape recordings should have been suppressed, and they repeat

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[6] In addition to the May 5 and May 25 orders, wiretap authorizations were granted on July 29, August 12, August 30, September 24, October 7, November 10, November 22 and November 30, 1978, and on January 2, February 2 and February 4, 1979.

their allegation that the indictment should have been dismissed because of the preindictment publicity. The appellants also challenge the trial court's failure to instruct the jury on their theory of the law. For the reasons set forth below, we affirm the convictions of all three appellants.

SUPPRESSION OF THE TAPE RECORDINGS

Appellants' May 5, 1980 motion to suppress the tape recordings raised several challenges to the legality of the first two and subsequent interception orders, and these arguments are raised again on appeal. The appellants rely primarily, however, on one argument which was reasserted in a memorandum in support of their motion for a new trial, in light of *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, ____ U.S. ____, 101 S.Ct. 1351 (1981), which was filed by this court on August 7, 1980.

The appellants contend that this court's decision in *Anderson* confirms their argument that the May 5 and May 25 orders were issued without probable cause. In *Anderson* this court addressed the issue of what constitutes an "enterprise" for purposes of the RICO statute, and the panel's decision in that case raises serious questions about whether the affidavits and the applications of the government in this case provided probable cause to support its theory that an "enterprise," in fact, existed. It is further asserted that if the May 5 and May 25 orders were issued without probable cause, then all of the subsequent orders, which were based on information obtained pursuant to the initial orders, must also be illegal.

In *Anderson* the defendants, both county judges, were convicted of substantive RICO violations for accepting bribes and kickbacks in their capacities as county purchasing

agents, in violation of 18 U.S.C. §1962(c) and (d):

> (c) It shall be unlawful for any person employed by or associated with any *enterprise* engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs *through a pattern of racketeering activity* or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

(Emphasis supplied.) On appeal, this court concluded, however, that the defendants' scheme of defrauding their respective counties did not constitute an "enterprise" within the meaning of the statute because the set of facts which were asserted to prove the existence of the enterprise—namely, the scheme of accepting bribes—were the very same facts which were asserted to prove the element of "a pattern of racketeering activity.[7] In the panel's view, the element of the crime which involved participation in an "enterprise" required a showing of a "discrete economic association existing *separately* from the racketeering activity." *United States v. Anderson, supra,* 626 F.2d at 1372 (emphasis supplied). Thus, the court, in overturning the convictions of

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[7] 18 U.S.C. §1961(1) defines "racketeering activity" as "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year," and "any act which is indictable under any of the following provisions of title 18, United States Code:" sections 201, 224, 471-473, 659, 664, 891-894, 1084, 1341, 1343, 1503, 1510, 1511, 1951-1955, 2314, 2315, 2341-2346, 2421-2424, and 29 U.S.C. §§186 and 501(c), and various offenses under title 11.

the defendants on the counts alleging RICO violations held that:

> Congress intended that the phrase "a group of individuals associated in fact although not a legal entity," as used in its definition of the term "enterprise" in section 1961(4), to encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that an be defined apart from the commission of the predicate acts constituting the "pattern of racketeering activity."

Id.[8]

Based on the interpretation of the RICO statute set forth in *Anderson*, the appellants contend that the tape recordings in

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[8]At the time of the court's opinion in *Anderson*, as was pointed out therein, the Sixth Circuit was this court's "sole ally," and its opinion in *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), *vacated and submitted for rehearing en banc*, April 2, 1980, required proof that the enterprise encompass only *legitimate* associations, whereas *Anderson* required the somewhat different showing of a "discrete economic association existing separately from the racketeering activity."

Since the filing of the *Anderson* opinion, the Sixth Circuit has overruled its previous opinion and adopted the theory that the term "enterprise," as employed in RICO, also encompasses associations of individuals which have no legitimate purpose. *United States v. Sutton*, No. 78-5134 (6th Cir. Dec. 3, 1980) (en banc), *rev'g United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979).

At the time of writing this opinion, the only circuit which has taken a position similar to the Sixth Circuit's original position in *Sutton* is the First Circuit, in *United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3525 (U.S. Jan. 27, 1981). The Supreme Court will ultimately decide that case. Other courts have maintained their positions or in other instances have specifically rejected the rationale set forth in both *Anderson* and *Turkette*. *See, e.g., United States v. Clemente*, No. 80-1261 (2d Cir. Feb. 26, 1981); *United States v. Mannino*, 635 F.2d 110, 117 (2d Cir. 1980); *United States v. Sutton, supra*, (6th Cir. Dec. 3, 1980).

this case should have been suppressed. Since the May 5 and May 25 applications and orders alleged no activities of the suspected enterprise beyond violations of state and federal statutes which are listed in 18 U.S.C. §1961(1) as the activities which constitute "racketeering activity,"[9] it is claimed that there was no probable cause to support the alleged RICO violation because there was no evidence of a "discrete economic association existing *separately* from the racketeering activity."

We decline to reach the merits of the appellants' challenge to the May 5 and May 25 orders, however, for two reasons. In the first place, the appellants have no "standing" to challenge the two court orders.[10] Second, we find no compelling reason for applying the *Anderson* decision retroactively in this case.

The two court orders based on alleged RICO violations provide no grounds for the appellants' fourth amendment claims. Our review of the case law and the federal wiretap statute[11] indicates that a defendant may challenge evidence

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[9]*See* nn. 4, 5, and 7, *supra*.

[10]Since *Rakas v. Illinois*, 439 U.S. 128, 139 (1978), the traditional theories of standing have been "more properly subsumed under substantive Fourth Amendment doctrine," which focuses on "the extent of a particular defendant's rights under the fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." In our view, however, the result in this case would be the same under either approach.

[11]18 U.S.C. §2518(10)(a) provides, in part, that "[a]ny aggrieved person * * * may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom," on the ground that it was unlawfully intercepted. The term "aggrieved person" is defined in 18 U.S.C. §2510(11) as any "person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." *See United States v. Jabara*, 618 F.2d 1319, 1326 (9th Cir.), *cert. denied*, ____ U.S. ____, 101 S.Ct. 154 (1980).

gathered pursuant to an interception order only if it is shown "that it was directed at *him*, that the Government intercepted *his* conversations or that the wiretapped communications occurred at least partly on *his* premises." *United States v. Williams*, 580 F.2d 578, 583 (D.C. Cir.), *cert. denied*, 439 U.S. 832 (1978). As the Supreme Court held in *Alderman v. United States*, 394 U.S. 165, 171-72 (1969):

> The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself not by those who are aggrieved solely by the introduction of damaging evidence.

This same principle is applicable in the present appeal, where defendants challenge evidence intercepted pursuant to a wiretap order on the ground that the order was tainted by illegally obtained evidence gathered under the authority of an earlier, unconstitutional wiretap order. Under similar circumstances, this court has held that the fourth amendment protections are available only to those whose rights were violated by the earlier wiretap order:

> It is urged by appellants Bonfiglio and Cappellano, Jr. that the 1973 tap was tainted by the government's knowledge of and use of the evidence illegally obtained by the 1970 tap. Bonfiglio and Cappallano, Jr. clearly are without standing to raise this contention. Neither was named as a target in the 1970 wiretap application, and neither was a party to a conversation recorded or intercepted as a result thereof. Fourth Amendment protections applicable to electronic surveillance are available only to those whose rights were violated by the search itself, not to "those who are aggrieved solely by the introduction of damaging evidence." *Alderman v. United States*, 394 U.S. 165, 172, 89 S.Ct. 961, 965, 22 L.Ed.2d 176 (1969).

United States v. Abramson, 553 F.2d 1164, 1170 (8th Cir.), *cert. denied*, 434 U.S. 843 (1977). *Accord, United States v. Williams, supra*, 580 F.2d at 583; *United States v. Fury*, 554 F.2d 522, 525-26 (2d Cir.), *cert. denied*, 433 U.S. 910 (1977); *United States v. Plotkin*, 550 F.2d 693, 694-95 (1st Cir.), *cert. denied*, 434 U.S. 820 (1977).

Although we are aware that Nicholas Civella and Peter Tamburello were named in the affidavits in support of the May 5 and May 25 applications, we find this insufficient to invoke the suppression doctrine for the protection of their fourth amendment rights. None of the defendants are named as "targets" of the first two interception orders, and none of their conversations were recorded under the authority of the challenged orders. We have carefully reviewed the challenged affidavits, applications and orders, and we find no basis for the application of the suppression doctrine simply because the overall investigation may in some way have been directed against Civella and Tamburello. *Cf. Rakas v. Illinois*, 439 U.S. 128, 134-35 (1979).

Second, even if the defendants had grounds for asserting that their fourth amendment rights were violated by the challenged orders, we still would decline to reach the merits of their claim. Our review of the case law and the affidavits, applications and orders, has convinced us that the May 5 and May 25 orders were supported by probable cause at the time they were issued, and we find no justification under the facts of this case for suppressing the fruits of that investigation simply because this court issued a new interpretation of the RICO statute *after* the defendants had been indicted, tried and convicted of substantive offenses under other statutes.

In *Anderson, supra*, 626 F.2d at 1372, Judge Gibson noted that the holding of the court placed this circuit in "direct opposition" to virtually every court which had

considered the issue. And at the time the challenged orders were issued, no court had adopted a position similar to this court's in *Anderson.* Thus, the investigating officers in this case were operating under a "presumptively valid" interpretation of RICO, and we do not understand the probable cause standard to require the investigating officers to know that the prevailing interpretation of a statute might eventually be held invalid or unconstitutional. *Michigan v. De Fillippo,* 443 U.S. 31, 37-38 (1979). Moreover, under these circumstances, no underlying purpose of the exclusionary rule requires the suppression of the evidence. "No conceivable purpose of deterrence would be served by suppressing evidence which" at the time it was intercepted, was the product of a lawful interception order. *Id.* at 38 n. 3.

Finally, we have examined the appellants' remaining challenges to the interception orders, including claims that the subsequent interceptions which provided the evidence for the convictions were not minimized, that the affidavits failed to satisfactorily state why other investigative procedures were not employed, that the affidavits failed to demonstrate the need for the wire and oral interceptions and that the interceptions were unconstitutional. We have considered these claims and find them to be without merit. Accordingly, the district court's denial of the motion to suppress the tape recordings is affirmed.

GRAND JURY BIAS

Appellants' two motions for the dismissal of the indictment are founded on the claim that the grand jury was biased by massive prejudicial publicity which spanned a period of more than a decade prior to the indictment. The

affidavit of Scott Whiteside of the Kansas City Star and the volume of news articles attached to it are convincing evidence of the publicity surrounding appellant Civella and, to a much lesser degree, Peter Tamburello. Nevertheless, we conclude, as Judge Wright did, that the appellants have failed to carry their burden of proving that the grand jury was, in fact, prejudiced.

The first motion to dismiss is a general challenge to the grand jury indictment, alleging in a conclusory fashion that the grand jury was biased by the publicity referred to above. Dismissal of an indictment on such grounds is an extreme remedy, and the burden to be carried by a party seeking such relief is appropriately a heavy one:

> The cases which have considered the question of preindictment publicity and its effect on the grand jury, rather than holding that preindictment publicity is inherently prejudicial and cause for dismissal of the indictment, have held that the defendant must show specifically that such publicity caused prejudice and bias in the grand jurors and that the indictment returned was the result of essential unfairness.

United States v. Anzelmo, 319 F.Supp. 1106, 1113 (E.D. La. 1970) (and cases cited therein). We agree with the district court that "the defendants have failed, despite strenuous efforts, to prove that preindictment publicity did, in fact, influence or prejudice the grand jury in returning an indictment against them* * *."

The second motion for dismissal of the indictment raises the more serious allegation that much of the prejudicial publicity was government-engendered, and the appellants suggest that a showing of actual prejudice is unnecessary under such circumstances. We disagree.

The appellants refer specifically to interviews granted by government officials to members of the press which resulted

in a five-part series of articles in the Kansas City Star, and to press releases issued by the FBI. These releases of information are alleged to have been "orchestrated" with the intent to "create in the public mind a favorable image of the forces of prosecution and a highly prejudicial image of the Defendants under investigation." These and other instances of alleged government misconduct are claimed to have amounted to a denial of due process and a violation of Department of Justice Regulation 28 C.F.R. §50.2, relating to the release of certain types of prejudicial information.

As the trial court observed, an "argument nearly identical to the defendants' was made" in *United States v. Stanford,* 589 F.2d 285, 298-99 (7th Cir. 1978), *cert. denied,* 440 U.S. 983 (1979). In that case, the defendants claimed that prejudicial publicity was generated by a United States Attorney throughout the grand jury investigation and the trial, in violation of the fifth and sixth amendments and 28 C.F.R. §50.2. The Seventh Circuit Court of appeals affirmed the district court's refusal to dismiss the indictment on these grounds, however, because the defendants had failed to show prejudice:

> Furthermore, the defendants' allegation that the generation of publicity was intentional misconduct, even if true, does not merit a dismissal of these indictments. * * * To dismiss the indictments here in the absence of any showing of prejudice would * * * constitute a "punishment of society for misdeeds of a prosecutor."

Id. at 299. And although the court held that the prosecutor "may have violated 28 C.F.R. §50.2," the court found no basis on that ground for "dismissing the indictments challenged here." *Id.* at 300.

In our view, Judge Wright was correct in holding that "it is the prejudicial effect of preindictment publicity, rather than

its source, which is the significant consideration in determining whether an indictment should be dismissed. *Accord, United States v. Archer,* 355 F.Supp. 981, 987-88 (S.D.N.Y. 1972)." And although we feel no necessity to comment on the content of the government press releases and interviews in the absence of a showing of prejudice, we note that the information complained of relates primarily to matters of public record. *United States v. Archer, supra,* 355 F.Supp. at 988. Finally, although Judge Wright found it unnecessary to rule on the merits of the claim that the government agents violated 28 C.F.R. §50.2, it was specifically noted "that there was little, if any, evidence to support this claim." Accordingly, the denials of the motions to dismiss the indictment are affirmed.

JURY INSTRUCTIONS

The appellants' final claim is that the district court erred in not instructing the jury as requested in two of their proposed instructions. Again, we disagree.

The nine tape recordings which were introduced into evidence revealed that the appellants were involved in a scheme to bribe the warden of a federal correctional center in Ft. Worth, Texas, to obtain the transfer of Anthony Civella, the defendant's nephew, to a minimum security prison. Tortora, an inmate of the Ft. Worth institution, agreed with Civella that he would discuss the possibility with the warden. The remaining conversations involved all three of the appellants and laid the groundwork for the entire scheme, including the plans for the payment, the plans for the transfer and the reports on the progress of the schemes.

Defendants' Instruction A attempts to downplay the

significance of these conversations by implying that the conversations do not constitute overt acts:

> Mere conversation, in and of itself, cannot be construed as the basis for proof of a conspiracy.

This is clearly an incorrect statement of the law. Telephone conversations and meetings in which plans and arrangements are made in furtherance of the conspiracy are overt acts. *United States v. Marable,* 574 F.2d 224, 230 (5th Cir. 1978). Therefore, Instruction A was properly refused. *United States v. John Bernard Industries, Inc.,* 589 F.2d 1353, 1361 (8th Cir. 1979).

Defendants' Instruction B similarly misstates the law of conspiracy:

> If you find that overt acts alleged in acts 3-9 of the indictment were not made to influence the decision of the warden, then the conversations of the defendants do not constitute a violation of law.

This instruction confuses the crime underlying the conspiracy with the agreement to commit that particular crime, which is the "essence" of the crime of conspiracy:

> The essence of the crime of conspiracy is the agreement and not the commission of the crime which is the object of the conspiracy. United States v. Rabinowich, 238 U.S. 78, 35 S.Ct. 682, 59 L.Ed. 1211. It is immaterial to the commission of the crime of conspiracy whether the object of the conspiracy is achieved.

United States v. Carlton, 475 F.2d 104, 106 (5th Cir.), *cet. denied,* 414 U.S. 842 (1973). Accordingly, the appellants were also properly denied this instruction. *United States v. John Bernard Industries, Inc., supra,* 589 F.2d at 1361.

Accordingly, we find no error in the trial court's refusal to give the instructions requested by the appellants. In light of

this conclusion and the conclusions reached in the preceding sections of this opinion, the convictions of the appellants are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1828 September Term, 1980

United States of America, Appellee,
vs.
Nicholas Civella, Appellant.

No. 80-1829

United States of America, Appellee,
vs.
Peter Tamburello, Appellant.

Appeals from the United States District Court for the Western District of Missouri.

No. 80-1844

United States of America, Appellee,
vs.
John Tortora Appellant.

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc in these causes, and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Appellants' supplementary material was forwarded upon receipt to all of the Judges of the Court.

June 10, 1981